Office - Supreme Court, U.S.
FILED
JUN 24 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-1919

In the Supreme Court of the United States

OCTOBER TERM, 1982

MARATHON PIPELINE COMPANY
Respondent,

VERSUS

ROWAN COMPANIES, INC. and
DRILLING RIG ROWAN/ODESSA,
Petitioner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF SUN OIL COMPANY (DELAWARE)

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**LIST OF PARENTS,
SUBSIDIARIES AND AFFILIATES
OF RESPONDENT, SUN OIL COMPANY
(DELAWARE)**

CANYON REEF CARRIERS, INC.
EAST TEXAS SALT WATER DISPOSAL COMPANY
VAN SALT WATER DISPOSAL COMPANY
SUNCOR INC.
ALBERSUN PIPELINE LTD.
ALBERTA GAS TRUNK LINE COMPANY LTD.
ATHABASCA REALTY COMPANY LIMITED
BARON PETROLEUMS INC.
CARNDUFF GAS LIMITED
GOW FUELS INC.
MAYWELLE PROPERTIES LTD.
NOTTINGHAM GAS LIMITED
OUIMET-GOBEILLE INC.
PEMBALTA GAS SYSTEM NO. 3 LTD.
PEMBALTA GAS SYSTEM NO. 4 LTD.
REDWATER WATER DISPOSAL COMPANY LIMITED
SMS PETROLEUMS LTD.
SULTRAN LTD.
SUN-CANADIAN PIPE LINE COMPANY LIMITED
SUN EXPLORATIONS OF QUEBEC LTD.
SUN OIL COMPANY OF CANADA LIMITED
SUNCOR SUPPLY LIMITED
SUNOCO INC.
CHEMSUN INC.
SOLARTECH LIMITED
SUNCHEM INC.
SUNCHEM SHIPPING INC.
SUNCHEM (U.K.) LIMITED
TRILLIUM EXPLORATION CORPORATION
RAUB SUPPLY COMPANY
CARBOLINE-FERRO POWDER COATINGS COMPANY

VESSEY CHEMICALS PTY. LTD.
CARBOLINE COATINGS LTD.
CARBOLINE SOUTH EAST ASIA LTD.
STAR CARBOLINE
TARANAKI BLAST SERVICES LTD.
JAPAN CARBOLINE COMPANY
CARBOLINE EUROPE
CARBOLINE S. A. de C.V.
TRETOL LTD.
SUNOLIN CHEMICAL COMPANY
HEMISPHERE OIL COMPANY, INC.
JAPAN SUN OIL COMPANY, LTD.
LUGRASA, S. A.
SUNOCO DE CHILE, LTDA
ALASKA BULK CARRIERS, INC.
GLACIER BAY TRANSPORTATION COMPANY
EXPLORER PIPELINE COMPANY
INLAND CORPORATION
MID-VALLEY PIPELINE COMPANY
TEXOMA PIPE LINE COMPANY
WEST TEXAS GULF PIPE LINE COMPANY
LONG BRANCH EQUIPMENT COMPANY
PERRY COUNTY COAL CORPORATION
WHITE RIVER SHALE OIL CORPORATION
DEEPSEA VENTURES, INC.
OIL INSURANCE LIMITED
TOTEM RESOURCES CORPORATION
INTERNATIONAL BIOMEDICAL INSTRUMENTS, INC.
THE VLM CORPORATION

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

1. Federal Rules of Civil Procedure, Rule 46:

Rule 46. Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires

the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

2. Federal Rules of Evidence, Rule 615

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

SUMMARY OF ARGUMENT

The sequestration of petitioner's witness, Robert McCary, did not violate petitioner's constitutional rights, or F.R.E. Rule 615.

Petitioner's claimed "designated representative" was not qualified as such under Rule 615 as he was never shown to be an officer or employee of petitioner, Rowan Companies, Inc., in fact, he was not an officer or employee as he admitted in his testimony. Additionally, petitioner made no objection to the sequestration of McCary nor did it seek to designate any other representative, such as its Executive Vice President or General Counsel who were available and did testify during the trial. Petitioner has failed to demonstrate any resulting prejudice from the

court's sequestration order.

ARGUMENT

MAY IT PLEASE THE COURT:

Rowan Companies, Inc. has petitioned this court for review claiming error on the part of the District Court in including Robert McCary in its sequestration order. The petitioner claims that it was entitled to designate this witness as its "company representative" and therefore exclude him from sequestration under Rule 615, Federal Rules of Evidence.

The District Court was correct in sequestering McCary from trial for any one of four reasons.

First, although placed at issue at the outset of trial by counsel for John E. Chance & Associates, Inc., Mr. Steen, Rowan failed to make a showing that McCary was an officer or employee of petitioner, Rowan Companies, Inc. (See: Appendix A, Tr. pp. 4-5)

As discussed by the U.S. Court of Appeals, Fifth Circuit, the only showing was that McCary was employed by Rowan International, Inc. (See: Appendix B, Tr. p. 539) No explanation was given as to what relationship existed, if any, between petitioner, Rowan Companies, Inc. and Rowan International, Inc. It is clear that they are separate corporations. (See: Appendix C, Opinion and Judgment of U.S. Court of Appeal for the Fifth Circuit) This falls far short of the required showing that the witness was "... an officer or employee of a party ..." as spelled out in Rule 615, Federal Rules of Evidence.

McCary's employer, Rowan International, Inc. is listed as the twenty-second entry on the Rowan Companies, Inc. list of parents, subsidiaries and affiliates (Appendix E, p. A-36, Vol. II, Petition for Writ of Certiorari, incorporated herein by reference) and is further evidence of the correctness of the sequestration ruling in the trial court.

In *Varlack vs. SWC Caribbean, Inc.*, 550 F.2d 171 (3rd.Cir.1977), the court refused to allow a former owner of a corporate defendant to remain in the courtroom. There is even less connexity between McCary and Rowan Companies, Inc. than there was in *Varlack, supra.* As stated above, the record actually indicates that McCary was not an officer or employee of a party.

The *Varlack* decision also provides a second ground for affirming the District Court. In refusing to find error in the trial court's ruling, the Third Circuit stated as follows:

> Since SWC Caribbean did not describe Creque's present status with sufficient clarity, its due process claim is also groundless. At p. 175.

Counsel for Rowan gave no explanation as to McCary's status, other than to state that he was the "rig manager". As it developed in the testimony of this witness, his status was not that which would entitle him to be excluded from sequestration.

Third, counsel for Rowan did not object or claim that its constitutional rights were being violated at the time that McCary was subjected to the sequestration rule. The transcript (See: Appendix A, Tr. pp. 4-5) clearly shows that Rowan's counsel made no objection and made no attempt

to inform the court of the action he desired. He made no attempt to factually demonstrate that McCary fell within an exception to the sequestration rule. He made no request for protective measures. He did not attempt to designate any other "officer or employee" of Rowan Companies, Inc. as its company representative such as its General Counsel or Executive Vice President, each of which testified during the trial. (See: Appendix D, Tr. pp. 462-463 and 468-470 and Appendix E, Tr. pp. 489-491)

Although F.R.C.P. Rule 46 does not require a formal exception to a court order, the provisions do require that a party's objection be made known to the court in some manner. *Brookhaven Landscape & Grading Co., Inc. vs. J. F. Barton Contracting Co.*, 676 F.2d 516 (11th.Cir.1982); *Neu vs. Grant*, 548 F.2d 281 (10th.Cir.1977).

The requirement of making an objection known to the court and other parties serves two purposes as set out in *Neu, supra*, as follows:

> It provides the trial court with the opportunity to know the specific contentions and to take corrective action, if required. And—more importantly for appellant review—it does not permit a party to sit idly by, watching error being committed, and then take a "first" shot at the claimed error without having accorded the trial court the opportunity to correct its action. Such is not allowed. Johnson v. United States, 318 U.S. 189, 63 S.Ct. 549, 59 L.Ed. 704 (1943); Chavez v. New Mexico, 456 F.2d 1072 (10th.Cir.1972). At p. 287.

In this instance, Rowan gave no opportunity for corrective action by the court. This issue was first addressed on appeal and no objection was made below.

Due to Rowan's failure to comply with Rule 46, this issue is not reviewable by this Honorable Court.

Finally, Rowan has failed to show any prejudice resulted from the court's ruling. In order for error to be grounds for reversal, the petitioner must demonstrate how it was prejudiced by the court's action. *United States v. Warren*, 578 F.2d 1058 (5th.Cir.1978); *Wood vs. Southwestern Bell Telephone Co.*, 637 F.2d 1188 (8th.Cir.1981), *cert. den.* 102 S.Ct. 142, 454 U.S. 837, 70 L.Ed.2d 118.

Rowan has failed to demonstrate just how it was prejudiced by McCary's absence. In this regard it is important that petitioner's Executive Vice President, Yeargain, as well as its General Counsel, Magner, were present in the courthouse and available for attendance at all phases of the trial. They each testified as witnesses in the case. (See: Appendix D, Tr. p. 462 and Appendix E, Tr. pp. 489-490) Yeargain was familiar with oilfield work having risen from a roustabout to Executive Vice President (See: Appendix D, Tr. pp. 462-463 and 468-470), and he claimed knowledge of the type of operations which were at issue in this case. Magner, General Counsel, was also familiar with oilfield operations and even more importantly was the author of the contract which was at issue and which spelled out the duties and relationships among the parties. (See: Appendix E, Tr. pp. 489-491) Both Magner and Yeargain were involved in the actual planning and execution of the movement of the rig which was the subject of the litigation. (See: Appendix D, Tr. pp. 462-463 and 468-470 and Appendix E, Tr. pp. 489-491) Either could have qualified as company representative under Federal Rules of Evidence, Rule 615; neither was offered in place of McCary.

CONCLUSION

No error was committed by the trial court in subjecting McCary to the sequestration order. The fact that the witness was not an officer or employee of Rowan Companies, Inc. disqualifies him as a person entitled to exclusion from sequestration. Alternatively, and for the purpose of argument, even assuming that the trial judge was in error in sequestering McCary, Rowan has failed to show the required prejudice. The petition for writ of certiorari should be denied.

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PROOF OF SERVICE
CERTIFICATE OF BAR MEMBER

I, P. Albert Bienvenu, Jr., one of the attorneys for Sun Oil Company (Delaware), respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 23rd day of June, 1983, I served three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on all parties required to be served under Rule 28 of the Rules of the United States Supreme Court, as follows:

1. Henry J. Read, Esq., attorney for Marathon Pipeline Company, at Montgomery, Barnett, Brown & Read, 1800 First NBC Building, New Orleans, Louisiana, 70112.

2. James E. Blazek, Esq., attorney for Rowan Companies, Inc. and the Drilling Rig ROWAN/ ODESSA, at Adams & Reese, 4500 One Shell Square, New Orleans, Louisiana, 70139.

3. Charles W. Steen, Esq., attorney for John E. Chance & Associates, Inc., at Liskow & Lewis, 50th Floor, One Shell Square, New Orleans, Louisiana, 70139.

4. George W. Healy, III, Esq., attorney for Twenty Grand Offshore, Inc., Tidewater Marine Services, Inc., the tug EL ZORRO GRANDE, the tug EL JAGUAR GRANDE and the tug LEO PARDO GRANDE, at Phelps, Dunbar, Marks, Claverie & Sims, Hibernia Bank Building, New Orleans, Louisiana, 70130.

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APPENDIX "A"

THE COURT: Are counsel ready?

MR. READ: Plaintiff is ready?

THE COURT: Would you please enter an appearance for the record, Mr. Read.

MR. READ: For the plaintiff, Marathon, Henry Read and Gordon Grant of Montgomery, Barnett, Brown & Read.

MR. BLAZEK: For the Rowan Companies, Jim Blazek, Mr. Ernest Carrere, Alan Zaunbrecher, Jim Wright.

MR. BIENVENU: For Sun Oil Company of Delaware, Albert Bienvenu, Jr. and John McAuliffe.

MR. HEALY: May it please the Court, for Tidewater and Twenty Grand, George Healy and Richard Dicharry.

MR. STEEN: For John Chance & Associates, Charles Steen and Larry Roedel.

THE COURT: Okay, gentlemen. Do you wish the witnesses sequestered?

MR. READ: Yes, your Honor.

MR. STEEN: We would ask that they be sequestered, and I notice that Rowan Company has Mr. McCary sitting here, apparently as a representative. He's not an officer or representative of the company, and I

would suggest that he ought to be sequestered, too.

MR. BLAZEK: We intend to have Mr. McCary here as the client representative in order to assist us in the trial of this case.

THE COURT: Will he testify?

MR. BLAZEK: Yes, sir, he will.

MR. STEEN: He is a key witness, your Honor.

MR. BIENVENU: I join in the objection.

THE COURT: What is his position with the corporation?

MR. BLAZEK: He is the rig manager. That's his official title.

APPENDIX "B"

ROBERT McCARY,

after having been first duly sworn by the Deputy Clerk, testified on his oath as follows:

EXAMINATION BY MR. BLAZEK:

Q Would you state your name for the record, please.

A Robert George McCary.

Q And Mr. McCary, where do you live?

A Metairie, Post Office Box 7493, Metairie.

Q By whom are you employed?

A Rowan. Rowan International.

Q Okay. And what is your job?

A Rig manager.

Q What does a rig manager do?

A He's in charge of all operations of the rig.

Q Okay. Can you tell us just briefly, very shortly, what that entails.

A Well, mechanical, down-hole problems, moving of the rig, and getting it ready to move.

APPENDIX "C"

MARATHON PIPE LINE COMPANY,
Plaintiff-Appellee Cross-Appellant,

v.

DRILLING RIG ROWAN/ODESSA,
Rowan Companies, Inc.,
Defendants-Appellants,

v.

Tug El Zorro Grande, et al.,
Defendants-Appellees,

Sun Oil Company, et al.,
Defendants-Appellees, Cross-Appellants.

No. 81-3779

United States Court of Appeals
Fifth Circuit.

Feb. 28, 1983.

Pipe line owner brought suit in admiralty seeking compensation for damage sustained when pipeline was struck by drilling rig as rig was being moved to location of underwater oil well. The District Court, George Arceneaux, Jr., 527 F.Supp. 824, entered judgment in favor of pipe line owner, and an appeal was taken. The Court of Appeals held that sequestration of witness whom drilling rig owner sought to have present in courtroom as its "representative" was not established as successful ground for appeal.

Affirmed.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before JOHNSON, WILLIAMS and JOLLY, Circuit Judges.

PER CURIAM:

We AFFIRM on the basis of the opinion of the district court, 527 F.Supp. 824, with the additional finding which follows.

The district court did not discuss in its opinion an issue which has been raised by the Rowan Companies in its appeal. At the outset of the trial the district court ordered the sequestration of the witnesses, including Mr. Robert G. McCary, who was the person placed in charge of the moving of the drilling rig Rowan/Odessa. Mr. McCary was allowed to remain in the courtroom only after his testimony. Rowan now claims that Mr. McCary was its "designated representative" and, therefore, could not be excluded from the courtroom under Rule 615, Fed.R.Evid.

For any one of three reasons we find that the district court must be affirmed on its sequestration ruling. First, while the record makes it clear that the Rowan Companies stated Mr. McCary was their "representative" before the court placed him under the general order of sequestration, no objection nor claim of violation of the Constitution or laws or of Rule 615, Fed.R.Evid., was lodged by the Rowan Companies. There was not the slightest indication given that Rowan in any way disapproved of the ruling of the trial judge at that time or at any other time while this case was pending in the district court. This, undoubtedly, is why the district court did not refer to this matter in its opinion.

While it is true that Rule 46 of the Fed.R.Civ.P. does not require formal exceptions to rulings or orders of the court, that rule requires that the party must make known "to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor." After the objection to McCary's presence was made by another party, Rowan did not make known to the court any action which it desired the court to take. Nor did it object to the action of the court. Reading the record, there is no way that the court could have concluded that Rowan wished to make an issue of its action or disagreed with it in the slightest degree.

Second, on the face of the record McCary was not an employee of the Rowan Companies, Inc., the party to the proceedings. McCary testified on the stand that he was an employee, apparently, of a separate corporation, Rowan International. Rule 615, Fed.R.Evid., requires that to be excepted from sequestration the representative must be "an officer or employee of a party which is not a natural person...." Nothing in the record shows what the relationship was between the Rowan Companies and Rowan International nor does it show that McCary actually was an employee of the Rowan Companies, Inc. The record does not establish that the Rowan Companies were entitled to claim McCary as their representative under Rule 615.

Third, even assuming that the district court committed error in sequestering Mr. McCary, there was not the slightest reference to the effect of this sequestration throughout the entire record. The Rowan Companies make no showing that the ruling was prejudicial, and prejudice must be shown to justify reversal. As this Court held in *United States v. Warren*, 578 F.2d 1058, 1076 (5th Cir. 1978) (en banc), the failure to sequester government wit-

nesses, while clearly error, does not require reversal even in a criminal case without proof of prejudice.

We find that defendant Rowan Companies, Inc. have not established as a successful ground for appeal the sequestration of Mr. McCary from the courtroom until he was called as a witness.

AFFIRMED.

APPENDIX "D"

CHARLES W. YEARGAIN,

after having been first duly sworn by the Deputy Clerk, testified on his oath as follows:

EXAMINATION BY MR. BLAZEK:

Q Would you state your name for the record, please.

A My name is Charles W. Yeargain.

Q And, Mr. Yeargain, where do you live?

A I live in Houston.

Q Okay. And by whom are you employed?

A Rowan Company, Incorporated.

Q And what is your title?

A Executive vice-president.

Q And what do your duties consist of as executive vice-president?

A Looking after the drilling operations, primarily.

Q And how many drill rigs does Rowan have?

A Many.

Q What type of drilling rigs?

A Land, jack-up, semi-submersible, tenders, and self-contained platforms.

Q How long have you been employed by Rowan?

A Thirty-three years.

Q And would you tell the Court, just briefly and shortly as you can, the types of positions you've had at Rowan.

A I started out thirty-three years ago as a roughneck. I went from a roughneck to a derrick man, engine man, driller, tool pusher, drilling superintendent, division drilling superintendent, assistant to the president, vice-president, and then executive vice-president.

Q Are you familiar with the fact that Sun and Rowan entered into a contract to drill a well?

A Yes, sir.

Q And can you tell the Court on what block that well was to be drilled?

A I believe it was Block 331, East Cameron.

Q To your knowledge was Rowan ever informed of a hazard, sub-surface hazard or a pipeline in the area of this well site location?

A No, sir.

Q In your experience, and in your practice of drilling wells, is it a formal and customary thing when a company

has a hazard such as a pipeline to inform the drilling company of that hazard?

A Yes, sir.

Q Do they normally inform the drilling company well in advance of your rig going onto location?

A Yes, sir.

* * * * * *

A Oh, I'd say roughly $20,000,000.

Q How many of those jack-up rigs does Rowan Company own, or did it own in August of 1978, sir?

A Well, I can't be specific on that, but I would say probably six or eight.

Q Is the tool pusher the person that moves the rig from one location to another?

A No, sir.

Q Who, for Rowan, would be on the rig to move it from one location to another?

A The rig manager.

Q And he's an employee of Rowan; isn't that right?

A Yes, sir.

Q And in this particular case, when the Rowan Odessa—

A Wait a minute. What's your definition of "moving?"

Q My definition of moving?

A Yes, sir.

Q From here to there, from one place to another.

A Well, you mean he is on there to perform the physical necessities relating to the rig in moving from one point to the other?

Q Yes, sir, that's right. And, in connection with that movement, your—what do you call it—rig manager—

A Yes, sir.

Q —on this particular move, in August of 1978, to East Cameron Parish, Block 330, was a Mr. McCary, wasn't it?

A Not Block 330.

Q Oh, they didn't move to Block 330?

A I believe the contract said to 331.

Q Do you know where they moved?

A As far as I know, they went to 331. That's what the contract said.

Q You didn't give Mr. McCary the information that he was moving to Block 330?

A No, sir, that is not my responsibility.

Q Whose responsibility would it be to give Mr. McCary as to where the rig was going?

A That would be up to the operator.

Q Who is the operator?

A In this case it was Sun Oil Company.

Q So you just sent Mr. McCary out and told him to move the rig anywhere Sun wants to move; is that right?

A No, I didn't say that.

Q What did you tell him?

A We had a contract with Sun saying that they are going to move to Block 331.

Q Did Mr. McCary have a contract with him on the rig?

A No, sir.

Q What did he have on the rig with him that your company gave him?

A In what respect?

Q Any documents.

A He was told where to go.

Q By who?

A He was told what the location was.

Q Are you familiar with a shipping fairway in Block 331?

A No, sir.

Q He was told to go to Block 331 and set the rig down by Rowan?

A That's where the contract said we were going.

Q That's not what I'm asking.

A I don't know what he was told.

Q You don't know what he was told?

A No.

Q Would you expect him to set that rig down on a drilling fairway?

MR. READ: Shipping fairway.

MR. BIENVENU: I'm sorry, shippign fairway.

A Well, you can't set them in a shipping fairway.

Q (By Mr. Bienvenu) You can't put it down in a shipping fairway, can you, legally? Can you?

A No, sir.

Q Does Rowan send its rigs to a new location without looking at a map to see where it's going?

APPENDIX "E"

JOHN C. MAGNER,

after having been first duly sworn by the Deputy Clerk, testified on his oath as follows:

EXAMINATION BY MR. BLAZEK:

Q Would you state your name.

A My name is John C. Magner.

Q Mr. Magner—

THE COURT: Mr. Magner, could you approach the microphone a little bit more.

Q (By Mr. Blazek) Mr. Magner, where do you reside?

A I live in Houston, Texas.

Q And by whom are you employed?

A Rowan Companies.

Q And in what position do you hold at Rowan?

A Executive vice-president.

Q Okay. And, basically, what are you duties at Rowan?

A I'm in charge of several departments, production department, legal department, risk management, contract

negotiations.

Q Were you aware of a contract entered into between Rowan and Sun Oil?

A Yes, sir.

Q Would you tell the Court basically how that contract evolved.

A Yes. Sun Oil had a location on which another contractor had been initially selected for a job, but he was tied up. Our rig became available on short notice, and they made an arrangement with us over a matter of a week, and we consummated a contract.

Q Would you tell the Court where that drilling site was to be under the contract?

A The contract provided for a location in Block 331.

Q That was East Cameron?

A In East Cameron block, yes, sir.

Q Were you aware that Sun Oil changed that drilling site to Block 330?

A No, I was not.

Q Were you personally involved in the convection and the drawing up of this contract?

A Yes, sir, my office was.

Q In the contract with Sun, who agreed to provide the towing services for a field move?

A Sun.

Q And is that found in the Schedule E, No. 2, and also Schedule A, paragraph one?

THE COURT: Counsel, I was under the impression this has been stipulated to. Is there any need to go into it as far as proof is concerned?

MR. BLAZEK: Your Honor, if it has, certainly not.

A The answer is yes to your question.

MR. BIENVENU: I'm not sure how to respond because of his response.

THE COURT: Am I to understand that Sun was to pay for the tug hire, and that Rowan was to order the tugs? That was the stipulation as I recall it.

MR. BIENVENU: We stipulate to that, Judge.

THE COURT: It's been stipulated. Is there any particular reason why we have to go prove it up again?

MR. BLAZEK: No, none whatsoever, your Honor.

Q (By Mr. Blazek) In the Rowan contract with Sun, who agreed to provide the complete services for the surveying and marking of the drilling location?